No. 78-1926

In the Supreme Court of the United States

OCTOBER TERM, 1978

HARRY SCHREIBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1979. A petition for rehearing was denied on May 29, 1979. The petition for a writ of certiorari was filed on June 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial judge erred by failing to recuse himself *sua sponte* from presiding at petitioner's trial.

STATEMENT

Following a non-jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on seven counts of submitting false statements to the Interstate Commerce Commission, in violation of 18 U.S.C. 1001. He was sentenced to 18 months' imprisonment and a fine of $14,000. The court of appeals affirmed (Pet. App. 1a-16a).

Evidence at trial showed that petitioner was president and sole owner of Schreiber Freight Lines, Inc., a surface carrier the interstate operations of which were regulated by the ICC. Under the regulatory scheme, the ICC is empowered to grant a motor carrier a license, or "authority," which specifies the geographic area within which the motor carrier may operate (Tr., Dec. 12, 1977, 19-22). To obtain a temporary authority, the carrier must prove that an immediate and urgent need exists that is not being met by existing carriers. The ICC relies on statements from shippers claiming a need for the carrier's services in determining whether to grant the requested authority (*id.* at 23, 33-34).

In August 1974, Schreiber Freight Lines applied to the ICC for a temporary 29-state authority (Tr., Dec. 16, 1977, 8-9). To support this application, sales personnel from Schreiber Freight Lines obtained blank letterheads from the shippers that the Schreiber company served, filled in the body of those letters, signed the names of representatives of the various shippers, and submitted them to the ICC. These letters contained false statements and representations that had not been authorized by the shippers (Tr., Dec. 12, 1977, 128-149, 158-178, 194-207, 219-243, 253-274, 305-319, 337-352). Joseph Bruzzese, who had been general sales manager for Schreiber in August 1974, testified that the scheme was instigated by

petitioner, who ordered the sales people to procure the blank letterheads and instructed that the Schreiber secretaries type the letters of support using different typewriters and typewriter balls so the letters would not look alike (Tr., Dec. 16, 1977, 4, 8-14).

ARGUMENT

Petitioner contends (Pet. 4, 10-12) that the trial judge entertained a personal bias or prejudice concerning him and, hence, that the judge should have recused himself *sua sponte* from presiding at petitioner's trial.[1] As we show, however, there was no occasion for the trial judge to disqualify himself here.

The judge had practiced before the ICC prior to going on the bench, and he indicated at the outset of the trial his familiarity with the operations of that agency and the laws administered by it (Tr., Dec. 12, 1977, 24-25). Petitioner's claim, however, is based on statements made by the judge in the course of a post-trial motions hearing, involving, *inter alia*, discussion of a trial ruling to admit evidence of the Schreiber Freight Lines' previous civil violations of ICC regulations as evidence of petitioner's intent, motive, plan or design (A. 54A-70A).[2] Toward the end of this

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[1] In pertinent part, 28 U.S.C. 455(b) provides:

> He [the judge] shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; * * *.

[2] "A." refers to the appendix filed by petitioner in the court of appeals.

discussion, the following exchange took place between the judge and Edward Schwabenland, the attorney for the government (A. 64A-65A):

THE COURT: In the early days of the Motor Carriers Act, I think there were a larger number of people who were presidents of trucking companies who would come up the hard way from practically nothing, who displayed this attitude towards the Commission, than there are now.

The attitude in the early days was, "Do anything you can get away with, as far as the Commission is concerned."

MR. SCHWABENLAND: From my understanding from working with the ICC people, I think that attitude is still going on.

THE COURT: I once recall a remark I heard after a hearing with respect to a president of a trucking line in the South, who I will not name.

One man says, "I know him. I believe him any time except when he is under oath in an ICC hearing." And that was the attitude.

MR. SCHWABENLAND: Mm-hmm.

THE COURT: It seems to me that attitude or any attitude of that kind has some bearing upon the guilt or innocence of Mr. Schreiber here.

MR. SCHWABENLAND: Yes, Your Honor.

You have often stated throughout the trial that you as an ex-ICC attorney know what goes on in the ICC. I don't know what that had to play upon your impression of the facts, but you are the trier of facts.

We both agree—

THE COURT: Well, I tried to keep anything like that that I might know personally, because some of the things I have been mad at the ICC about, too, here.

MR. SCHWABENLAND: Yes, Your Honor.

THE COURT: So many people get away, and then other times I thought they were a little harsh. But that really has not colored my thinking here at all.[3]

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[3] In addition to indicating that he had not allowed his thinking to be colored by his past ICC experience, the judge also stated that he had "studiously avoided" reading a circuit court opinion in another case involving petitioner and had "kept that out of my mind in arriving at my conclusions here" (A. 65A).

Relying solely on this passage, petitioner argues (Pet. 10) that "the district court indicated that his experience had taught him that motor carrier presidents had a predilection to lie to the ICC and that such an attitude or propensity had a bearing on the guilt of petitioner Schreiber." This assertion apparently depends specifically on the court's statement: "It seems to me that attitude or any attitude of that kind has some bearing upon the guilt or innocence of Mr. Schreiber here" (A. 64A). But read in the context of the evidentiary ruling then before the court, it seems plain that the court was not suggesting that the attitude of *other* motor carrier presidents was somehow relevant to petitioner's case. Rather, the court was explaining that the evidence of prior civil violations by the company of which petitioner was the president and sole stockholder was relevant in petitioner's trial because it may reflect an attitude on the part of *petitioner* of disregard for ICC requirements and procedures. This is evident from a previous colloquy between the court and petitioner's counsel (A. 55A-56A):

THE COURT: * * * Schreiber Freight paid a civil forfeiture of $2,000 for twenty violations of operating beyond the scope of its authority. January '74 to July '74, Schreiber was again found guilty of 61 violations of operating beyond the scope of authority.

The Court considers this as some evidence of intent and attitude of the defendant towards the ICC rules and regulations.

MR. MARTIN: Is the intent and attitude of the individual defendant properly affected by the corporate pleas to these civil forfeitures? That's the issue that I raise.

THE COURT: Well, he is president and sole stockholder of this corporation. It seems to me it is some indication of an attitude, "To the dickens with the ICC. Anything you get away with is okay as far as the ICC goes."

The reference to other motor carrier presidents in the colloquy to which petitioner refers appears to have been only a reminiscence or an aside by way of further illustrating the rationale underlying the court's earlier evidentiary ruling. (Petitioner did not challenge the correctness of the evidentiary ruling itself in the court of appeals, and he does not do so in his petition for a writ of certiorari.)

Nor does the passage cited by petitioner indicate bias or prejudice against petitioner as a member of the class of motor carrier presidents. To be sure, the judge had certain personal insights and impressions about both the ICC and litigants before the ICC based on his past experience before that agency. It could scarcely have been otherwise. But such insights and impressions deriving from a judge's background and associations, as distinguished from an appraisal of the parties personally, is not a proper basis for disqualification. *United States* v. *Dansker*, 537 F. 2d 40, 54 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *Parker Precision Products Co.* v. *Metropolitan Life Insurance Co.*, 407 F. 2d 1070, 1077-1078 (3d Cir. 1969). Moreover, the judge emphasized that he was not allowing his personal experience before the ICC to color his thinking (A. 65A). Accordingly, this case is unlike *Berger* v. *United States*, 255 U.S. 22 (1921), relied upon by petitioner (Pet. 11), in which the judge's vehement bias against those of German nationality was personally directed against the defendants in the case.

Nor is there anything in the record to contradict the judge's avowal that his prior experience had not colored his judgment or to indicate that he held a personal bias against petitioner. Clearly the evidence in the case sufficiently established petitioner's guilt. Petitioner does not offer here, nor did he offer in the court of appeals, any evidence to indicate that the judge ruled on the merits on any basis other than the evidence before him. In short, neither the judge's former practice before the ICC nor his statements at the post-trial hearing warranted his recusal from the case.[4]

Petitioner further contends (Pet. 5-9) that the court of appeals erred in reviewing the recusal issue under the plain error standard rather than applying an abuse of discretion test. However, both the plain error and the abuse of discretion tests are stringent standards of review, and petitioner makes no showing that the result would have been different had the court below applied an abuse of discretion standard rather than the plain error standard. To the contrary, as we have demonstrated

[4]The judge also commented that he had initially held some concern about whether to preside over petitioner's trial because he had presided over a jury trial of Schreiber Freight Lines and its general sales manager on the same offenses (A. 57A-68A). The judge correctly concluded, however, that a recusal was not necessary in these circumstances. See, *e.g.*, *United States* v. *Haldeman*, 559 F. 2d 31, 131-139 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977); *United States* v. *Partin*, 552 F. 2d 621, 636-639 (5th Cir.), cert. denied, 434 U.S. 903 (1977). At the post-trial hearing, petitioner's trial counsel stated that "that consideration was fully explored by myself and my client, whether we should object to Your Honor sitting at a non-jury trial, having heard the first trial. It was our conclusion that you would be fair in the determination of these issues and we did not raise the objection" (A. 68A). Petitioner does not raise this issue in support of his petition here.

above, the trial judge's general statements relied upon by petitioner do not evidence a disqualifying personal bias within the meaning of Section 455(b)(1). Hence, petitioner would not have been entitled to relief no matter which standard was applied. In sum, there is no occasion for this Court to review petitioner's claim on the basis of the statements in the post-trial hearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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